Petition

Supreme Court, U.S.
FILED
APR 9 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1879

IN THE

Supreme Court of the United States

October Term, 1981

ALFRED THOMAS DE VAULT,

Petitioner,

vs.

ARMANDO M. MENOCAL, III, individually and as chair and member of the Committee of Bar Examiners of the State Bar of California; ROBERT H. O'BRIEN, individually and as former chair of the Committee of Bar Examiners of the State Bar of California; FRANCISCO CANCINO, MARTIN R. GLICK, MARY ANNE HARRISON, ROBERT A. HINE, CARLOS ORNELAS, PATRICIA PHILLIPS, BERTRAM S. SILVER, HERBERT J. SOLOMON, A. WALLACE TASHIMA, WILLIAM H. WAYSMAN, individually and as members of the Committee of Bar Examiners of the State Bar of California; ALFREDO CASTENEDA, individually and as former member of the Committee of Bar Examiners of the State Bar of California,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. Does a federal district court have subject matter jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) in the case of an applicant who alleges that a state committee of bar examiners violated his federal constitutional rights and falsely defamed him in the course of denying his admission to the bar, where the state supreme court has declined to exercise its discretionary jurisdiction to review the case?

2. Did the California Supreme Court's denial of review of the present petitioner's claims constitute a "final judgment or decree" reviewable by this Court under 28 U.S.C. § 1257?

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No. ....

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ALFRED THOMAS DE VAULT,

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vs.

ARMANDO M. MENOCAL, III, individually and as chair and member of the Committee of Bar Examiners of the State Bar of California; ROBERT H. O'BRIEN, individually and as former chair of the Committee of Bar Examiners of the State Bar of California; FRANCISCO CANCINO, MARTIN R. GLICK, MARY ANNE HARRISON, ROBERT A. HINE, CARLOS ORNELAS, PATRICIA PHILLIPS, BERTRAM S. SILVER, HERBERT J. SOLOMON, A. WALLACE TASHIMA, WILLIAM H. WAYSMAN, individually and as members of the Committee of Bar Examiners of the State Bar of California; ALFREDO CASTENEDA, individually and as former member of the Committee of Bar Examiners of the State Bar of California,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

Alfred Thomas De Vault, plaintiff in an action against respondents for the denial of civil rights, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit to affirm an order of the United States District Court for the Central District of California dismissing said action for lack of subject matter jurisdiction.

I.
OPINIONS BELOW.

The order of the United States District Court for the Central District of California, Docket No. 80-2974-WPG, is appended herein as Appendix A. The memorandum opinion of the United States Court of Appeals for the Ninth Circuit, Docket No. 80-5854, is appended herein as Appendix B.

II.
JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), to review a case in a court of appeals after judgment. Judgment in this case was entered by the United States Court of Appeals for the Ninth Circuit on January 13, 1982, and this petition is submitted within ninety days thereafter, as provided by 28 U.S.C. § 2101(c).

III.
STATUTORY PROVISIONS INVOLVED.

1. United States Code, Title 42, Section 1983 provides that, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress. . . ."

2. United States Code, Title 28, Section 1257 provides in pertinent part that, "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . . (3) By writ of certiorari, ... where any title, right,

privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

IV.
STATEMENT OF THE CASE.

Petitioner Alfred Thomas De Vault is a graduate of a duly-accredited law school in California. On July 26, 1978, he sat for that state's Multi-State Bar Examination ("MBE") and was later advised by the California Committee of Bar Examiners ("Committee") that he had failed the examination by scoring only 132 (out of 200) correct answers. A score of 133 was required to pass the exam. On December 1, 1978, petitioner exercised his right under state law to review his MBE answer sheets.[1] They were in his possession for approximately five to ten minutes, in full view of a Committee proctor. Both he and the proctor counted the number of answers shown to be correct and agreed that the total was 134. It was later determined that the discrepancy in scoring centered upon the answers given to the final two questions (Nos. 199 and 200), which were originally scored as incorrect, by an Educational Testing Service ("ETS") optical scanning machine, but were shown to be correct on review. The factual question presented by this case is thus: Did petitioner correctly answer the final two questions at the time of the examination, or did he attempt to defraud the Committee by changing those answers at the time of review? No other explanation of the discrepancy is reasonably possible.

After two inconclusive laboratory analyses of the answer sheets the Committee appointed an *ad hoc*, three-member subcommittee to investigate and recommend a decision in

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[1]California Business and Professions Code, Section 6065.

the matter. The subcommittee held hearings in May and June of 1979, taking sworn testimony from petitioner, the proctor and a technical expert from ETS. On July 11, 1979, a majority of the subcommittee found that petitioner had fairly passed the MBE and recommended his admission to the bar. Despite these findings and without giving any reason for its action the Committee advised petitioner on August 24, 1979, of its conclusion that he had failed the MBE and would not be certified for admission. In the same communication it offered him the opportunity to request a hearing before the full Committee, which he so did. The hearing requested was held on October 12, 1979, and, over petitioner's objection, was devoted solely to taking evidence against him, from another representative of ETS. On November 19, 1979, the Committee advised petitioner that it had finally decided against his application.

On January 18, 1980, in accordance with applicable state procedures,[2] petitioner requested the Supreme Court of California to issue a writ of review of his case, alleging that the Committee had deprived him of due process of law in reaching its decision. The Committee filed no answer to the petition but, instead, lodged with the Court a copy of its final report on petitioner's application. The report contains twelve findings and conclusions, including findings that petitioner had made certain perjurious statements and incriminating claims to the Committee and its agents.

On May 14, 1980, the Supreme Court denied petitioner's request for review, without elaboration. A copy of the Court's order of denial is appended herein as Appendix C.

On July 9, 1980, petitioner filed suit against respondents in the United States District Court for the Central District

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[2]California Business and Professions Code, Section 6066; California Rules of Court, Rule 952(c).

of California, under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), alleging that they, both as individuals and in their official capacities as members and former members of the Committee, had violated his civil rights in denying his application for admission to the bar. The complaint contains nine counts of violations of the right to due process of law and one count of violation of the right to equal protection of the laws, and specifically denies that petitioner made the perjurious and incriminating statements charged to him in the Committee's report.[3]

On October 10, 1980, the District Court ordered dismissal of the complaint for lack of subject matter jurisdiction. This order was affirmed by the Ninth Circuit Court of Appeals in its memorandum decision of January 13, 1982.

V.
REASONS FOR GRANTING WRIT.

1. The Primary Federal Question Presented Herein Has Not Heretofore Been Specifically Determined by This Court.

The first and major question presented in this petition is whether a bar applicant who properly alleges violations of his federal civil rights is entitled to a judicial hearing of his case. This appears to be a question of first impression.

In 1957 this Court handed down a landmark decision firmly establishing that:

> "A State cannot exclude a person from the practice of law in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Board of Bar Ex-*

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[3] Believing that a full appreciation of the nature and multiplicity of respondents' constitutional transgressions is essential to a proper understanding of his case, petitioner has requested that the complaint herein be certified and transmitted to this Court.

aminers (1957), 353 U.S. 232, 238 (77 S.Ct. 752, 756, 1 L.Ed.2d 796, 801).

Since that time the Court has issued a number of opinions concerning the scope and application of Fourteenth Amendment rights to be accorded to bar applicants, but it has not spoken directly to the all-important question of how those rights are guaranteed and the role played by the federal judiciary in securing them. This question has been left to state and lower federal courts and answered by them in a number of conflicting ways.

In determining federal jurisdiction over bar admission cases some courts have looked primarily to the character and effect of prior state adjudication, if any, holding that until a state court has somehow finally acted to deny admission there is no "deprivation" of a constitutional right within the meaning of 42 U.S.C. § 1983. See, *e.g. Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir. 1967); *Feldman v. State Board of Law Examiners*, 438 F.2d 699 (8th Cir. 1971). Others, including the court below, have adopted the so-called Theard Doctrine,[4] which purports to find original federal jurisidiction over any case involving a challenge to the constitutionality of generally applicable bar admission rules and procedures while denying jurisdiction in cases of essentially individual grievances, without regard to the character or finality of any state adjudication. *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976); *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980); *Dasher v. Supreme Court of Texas*, 650 F.2d 711 (5th Cir.

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[4]Derived from this Court's opinion in *Theard v. United States* (1957), 354 U.S. 278 (77 S.Ct. 1274, 1 L.Ed.2d 1342), holding that a state disbarment action does not necessarily serve to disbar an attorney from federal practice. *Theard* makes no distinction between general and individual challenges and its application to bar admission cases is somewhat questionable.

1981). For example, the operative sentence in *Brown* reads as follows:

> "We conclude that the preliminary injunction was improperly granted because the district court was without jurisdiction to review a decision of the Nevada Supreme Court *concerning an individual application for admission to the bar*."[5] (Emphasis added)

— thus strongly implying that a federal district court *may* review the decision of a state's highest court in other types of admission cases.

Still other courts have asserted federal jurisdiction over admission cases without regard to either prior state action or the nature of the complaint. For example, in *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) the court reviewed a complaint for essentially individual relief where no state adjudication had been sought, while in *Martin-Trigona v. Underwood*, 529 F.2d 33 (7th Cir. 1975) the same court ruled on the merits of a similar complaint even though the federal issues had been previously adjudicated by the state supreme court[6] and a petition for a writ of certiorari had been filed in this Court.

Confusion over the problem of jurisdiction is probably best illustrated by *Richardson v. McFadden*, 563 F.2d 1130 (4th Cir. 1977) where the court first concluded that a federal court was empowered to hear claims of individual discrimination[7] and then, after rehearing, strongly divided over the jurisdictional issue and ruled against plaintiffs on the merits.

In sum, not only has the scope of federal jurisdiction over bar admission cases not been determined by this Court, but

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[5]623 F.2d 605, 607.

[6]See *In re Martin-Trigona*, 55 Ill.2d 301, 302 N.E.2d 68 (1973).

[7]See *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976).

the need for such determination has become ever more clear, as illustrated by the cases cited above.

In the case at bar the court below affirmed dismissal for lack of subject matter jurisdiction on the ground that petitioner had requested essentially individual relief, citing its own decision in *Brown v. Board of Bar Examiners* as authority. While the facts in *Brown* bear some superficial resemblance to those of the present case, the jurisdictional issues raised therein are quite dissimilar. In *Brown* plaintiff had brought suit in federal district court against the Supreme Court of Nevada following the latter's denial, without elaboration, of her petition for waiver of its rule requiring graduation from a law school approved by the American Bar Association as a condition for taking the state's bar examination.[8] Her complaint, filed under 42 U.S.C. §§ 1981 and 1983, alleged that the state court had acted in an arbitrary and capricious manner in denying the waiver. Applying the *Theard* formula the court below ordered dismissal of the action for lack of federal jurisdiction, finding that plaintiff had requested only individual relief. Thus in *Brown* the only controversy presented was one directly between the plaintiff and the state court; it arose only when plaintiff's petition was denied, and only after the court had presumably considered the case for waiver on its merits.[9] In the case at bar, by contrast, petitioner requested the state court to

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[8]Plaintiff had also named the Nevada Board of Bar Examiners and the Nevada State Bar as co-defendants. However, the action against them was dismissed by the trial court on the ground that these agencies performed only a ministerial function in enforcing court rules. See *Brown v. Supreme Court of Nevada*, 476 F.Supp. 86 (D.Nev. 1979).

[9]Had the Nevada court failed to consider Brown's petition on the merits it is questionable whether its denial of waiver would even have given rise to a justiciable "case or controversy" within the meaning of Art. III, § 2 of the U.S. Constitution. See *In re Summers* (1945), 325 U.S. 561 (65 S.Ct. 1307, 89 L.Ed. 1795); *Ktsanes v. Underwood*, 552 F.2d 740 (7th Cir. 1977).

resolve an already existing controversy and the court simply declined to do so. In *Brown* any constitutional error that the state court may have committed was subject to review by this Court on writ of certiorari; in the present case no such review was available, for reasons given in the succeeding sub-part. The issue presented by the present case: whether an applicant whose constitutional rights have been violated by a bar examining authority is entitled to his "day in court" did not arise at all in *Brown*.

The notion that a person is entitled to have his grievances heard by an impartial tribunal is as old as King John's promise to the English barons that "To none will we sell, to none deny or delay, right or justice."[10] Though stated in a number of ways[11] the right to a "day in court" has been recognized both in statutory[12] and judge-made law[13] and is firmly embedded in American jurisprudence as an essential element of due process of law.[14]

The opportunities for state judicial review afforded to aggrieved bar applicants vary from state to state. In a limited number of jurisdictions the applicant may bring his case before a state court by appeal.[15] In most states, including California, however, review is obtainable only by petition

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[10]Magna Charta, Clause 40.

[11]For example, "For every wrong there is a remedy."

[12]See California Civil Code, Section 3523.

[13]See *Saunders v. Shaw* (1917), 244 U.S. 317 (37 S.Ct. 638, 61 L.Ed. 1163); *Helis v. Ward* (1939), 308 U.S. 283 (60 S.Ct. 283, 84 L.Ed. 327). See also cases cited in *Corpus Juris Secundum*, Constitutional Law, § 709.

[14]See *United States Constitution Annotated*, 1972 ed., p. 1438, quoting *Goldberg v. Kelly* (1970), 397 U.S. 254, 271 (90 S.Ct. 1011, 1022, 25 L.Ed.2d 287, 301).

[15]See, for example, Missouri Rules of Court, Rule 8.12.

and is entirely a matter of the state court's discretion.[16] As noted above, a substantial number of circuit courts have predicated federal jurisdiction in bar admission cases on the character of the complaint, with little or no regard to the availability of adequate state remedies and the extent to which they have been pursued. The result is a dichotomy where, on one end of the spectrum, federal jurisdiction has been asserted over cases already fully litigated in the state court system, despite the doctrine of *res judicata*,[17] while on the other end cases such as that at bar are denied any judicial review whatever.

A major reason for urging that this petition be granted is that the present case provides an ideal vehicle for this Court to establish a uniform rule of federal jurisdiction in bar admission cases — a rule that gives greater recognition to the fundamental requirements of *res judicata* and due process of law than is now being accorded by the several circuit courts. Such a rule would serve two desirable purposes: (1) to afford bar applicants a clearer picture of their remedies, both state and federal, and (2) to place greater responsibility upon the state judicatures for proper resolution of admission cases.

At bottom, however, petitioner requests this Court to consider his case as a necessary counterpart to its decision in *Schware*. Speaking for the Court in that case Mr. Justice Black noted that, "Certainly the practice of law is not a matter of the State's grace".[18] It is submitted that so long

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[16]Discretionary court review may be provided for by statute, (*e.g.*, see California Business and Professions Code, Section 6066) and where not so provided it may still be granted by the state's highest court. See *Woodard v. Virginia Board of Bar Examiners*, 454 F.Supp. 4, 5 (E.D.Va. 1978).

[17]For example, as in *Martin-Trigona v. Underwood*, cited *supra*, p. 7.

[18]353 U.S. 232, 239.

as a state court is permitted simply to turn its back on the legitimate grievances of a bar applicant, as was done in this case, and so long as such applicant is denied recourse to the federal judiciary, the practice of law, to that extent, depends indeed on nothing more than the "State's grace".

2. A Second Federal Question Presented Herein Has Been Decided in a Way in Conflict With Applicable Decisions of This Court.

The second question presented is whether a state court's unadorned refusal to extend its discretionary jurisdiction to review the complaints of a bar applicant constitutes a "final judgment or decree" within the meaning of 28 U.S.C. § 1257.

The court below has sought to gloss over the harshness of its ruling against petitioner by finding that the California court made a judgment on the merits of his case and that, consequently, he might have sought a review of such judgment by this Court. Even if this *were* true, petitioner would argue that having an opportunity to beseech the protection of two high courts of appeal is not the equivalent of a "day in court" — a bird in the "of right" hand being worth a great deal more than two in the discretionary bush. But he would further contend that the doors of this Court were never open to him, even in theory, and that the finding of the court below on this point is clearly erroneous.

It has long been settled that the discretionary refusal of a state court of appeal to review the judgment of a lower court is not considered as a judgment on the merits. In such a case this Court's writ of certiorari will run to the lower court. *Norfolk and Suburban Turnpike Co. v. Commonwealth of Virginia* (1912), 225 U.S. 264 (32 S.Ct. 828, 56 L.Ed. 1082). While a court's declination to review the actions of an administrative body such as a board of bar ex-

aminers presents a somewhat different problem, there is no authority to suggest that abstention from review is any more or less a decision on the merits in such a case.

The court below cites *Konigsberg v. State Bar of California* (1957), 353 U.S. 252 (77 S.Ct. 722, 1 L.Ed.2d 810) in support of its finding. Petitioner submits that, on the contrary, *Konigsberg* stands for exactly the opposite conclusion.

That case first appears in the reports of this Court at 351 U.S. 936 (76 S.Ct. 832, 100 L.Ed. 1464) where the Court announced its decision to grant a writ of certiorari and, concurrently, invited counsel to consider and be prepared to argue three threshold jurisdictional questions. The second of these questions was as follows:

> "Was the Supreme Court of California's denial of a petition for a writ of review merely a refusal by that court to exercise its discretionary jurisdiction or is it to be deemed a disposition, 'in the nature of a review,' (citation) and as such a final judgment within the meaning of 28 U.S.C. § 1257?"

There is nothing in the *Konigsberg* decision itself to suggest that the Court has abandoned this critical distinction. And there is nothing in the record of the present case, unlike in *Konigsberg*,[19] to indicate that the action of the California court was anything more than "merely a refusal to exercise its discretionary jurisdiction".

The finding of the court below that *Konigsberg* stands for the proposition that this Court will entertain petitions from any and every bar applicant unsuccessful in obtaining

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[19]In *Konigsberg* there was evidence to show that the petition was before individual members of the court (see 353 U.S. 252, 254) and was judicially acted upon. See *In re Summers*, cited *supra*, p. 8.

state court review is not only erroneous but dangerous.[20] To the extent that finding is honored and followed it will result in many wasteful expenditures of time and money on the part of disappointed applicants and an unwarranted burdening of the docket of this Court.

Conclusion.

In presenting this petition Alfred De Vault has argued the need for a uniform rule governing federal jurisdiction over admissions to the bar, with particular reference to the special problem presented when a state court simply declines to hear the individual grievances of an applicant against the bar admissions authority. In such a case, under the formula followed by the court below, the aggrieved applicant is denied any judicial recourse whatever. The injustice of such a result is poignantly illustrated by the facts of the case at bar.

As documented in his complaint, petitioner was not only summarily denied admission to the bar after an impartial body had found in his favor, he was then made the subject of a report by respondents in which he is accused of (1) committing perjury on two separate occasions[21] and (2) making certain statements tantamount to a confession that he had attempted to defraud the respondents by altering his examination answer sheets.[22]

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[20]The Court below also based its finding on its decision in *Brown*. For reasons noted in the preceding sub-part, however, it is clear that the state court's action in that case was much more in the nature of a "final disposition" rather than a "refusal to review."

[21]The Committee's Finding No. 11 states, "Alfred Thomas De Vault testified to the subcommittee and to the Committee that he had marked "D" to question No. 199 and "B" to question No. 200 at the time of the examination. Said testimony was knowingly false and made with intent to deceive the subcommittee and Committee."

[22]The Committee's Finding No. 2 states in pertinent part, ". . . the applicant reviewed his answers to the multiple choice portion . . . and claimed that he had not been given credit for correctly answering the final two questions, . . ." Petitioner could have had no way of knowing, at the time of his review, that his answers to the final two questions would be at issue unless he had in fact changed those two answers.

If allowed to stand the findings of this report, a public document, will damn petitioner for the rest of his life. They will assure that he is never admitted to the bar of California or of any other jurisdiction; they could easily serve to bar him from holding any office of public trust. They may very well have damaged him already, by dissuading the California court from reviewing his case.[23]

Alfred De Vault would close this petition by simply stating that he should have the right to clear his name by proving the utter falsity of the two findings in question. Doing this would not require even a day in court — less than an hour would probably suffice.[24] And if the doors of the federal judiciary be closed to him he has nowhere else to turn.

Respectfully submitted,

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Attorneys for Petitioner.

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[23]If, as the court below found, the state court *did* consider De Vault's petition on the merits its decision not to review might very well have turned on the court's assumption that Finding No. 2 was true and constituted a confession of guilt, rendering pointless any investigation of the Committee's procedures.

[24]The falsity of Finding No. 11, for example, is easily established. All of the petitioner's testimony to the subcommittee and Committee was transcribed. It comprises about 1500 words and can be read in little more than ten minutes.

Appendix

APPENDIX A.

Order Dismissing Complaint.

United States District Court, Central District of California.

Alfred Thomas De Vault, Plaintiff, v. Armando M. Menocal, III, individually and as chair and member of the Committee of Bar Examiners of the State Bar of California; Robert H. O'Brien, individually and as former chair of the Committee of Bar Examiners of the State Bar of California; Francisco Cancino, Martin R. Glick, Mary Anne Harrison, Robert A. Hine, Carlos Ornelas, Patricia Phillips, Bertram S. Silver, Herbert J. Solomon, A. Wallace Tashima, William H. Waysman, individually and as members of the Committee of Bar Examiners of the State Bar of California; Alfredo Casteneda, individually and as former member of the Committee of Bar Examiners of the State Bar of California, Defendants. No. CV 80-02974-WPG.

Filed: October 10, 1980.

Defendants' motion to dismiss plaintiff's complaint came on regularly for hearing on Monday, September 22, 1980, before the Honorable William P. Gray, United States District Judge Presiding in Courtroom No. 6 of the above entitled Court. Plaintiff appeared by and through his attorney John W. Black, and defendants appeared by and through their attorneys, Herbert M. Rosenthal and Robert M. Sweet, by Robert M. Sweet.

After considering all the pleadings, points and authorities and other documents on file herein, and after having heard and considered oral argument of counsel and being fully advised in the premises, the Court finds and concludes that it lacks jurisdiction of the subject matter of the complaint and, therefore, IT IS HEREBY ORDERED THAT:

1. Plaintiff's complaint is dismissed as to all defendants;

2. Each party will bear his/her own costs; and

3. The Clerk of this Court shall serve a copy of this Order upon the plaintiff and upon defendants through their counsel.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 10, 1980

/s/ William P. Gray
William P. Gray
United States District Court

APPENDIX B.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Alfred Thomas De Vault, Plaintiff-Appellant, vs. Armando M. Menocal, III, individually and as chair and member of the Committee of the Bar Examiners of the State Bar of California; Robert H. O'Brien, individually and as former chair of the Committee of Bar Examiners of the State Bar of California, Francisco Cancino, Martin R. Glick, Mary Anne Harrison, Robert A. Hine, Carlos Ornelas, Patricia Phillips, Bertram S. Silver, Herbert J. Solomon, A. Wallace Tashima, William H. Waysman, individually and as members of the Committee of Bar Examiners of the State of California; Alfredo Casteneda, individually and as former member of the Committee of Bar Examiners of the State Bar of California, Defendants-Appellees. No. 80-5854. D.C. # .... .

Filed: January 13, 1982.

Argued and Submitted: January 7, 1982.

Decided: ....., 198.. .

Appeal from the United States District Court for the Central District of California. Honorable William P. Gray, Presiding.

Before: PREGERSON and FERGUSON, Circuit Judges, and WEIGEL,* District Judge.

Alfred Thomas De Vault, an applicant for membership in the California bar, appeals the dismissal of his § 1983 action against thirteen present and former members of the Committee of Bar Examiners of the State of California.

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*The Honorable Stanley Weigel, United States District Judge for the Northern District of California, sitting by designation.

We affirm.

Although De Vault contends that there existed federal subject matter jurisdiction because he sought general as well as individual relief in his complaint, we find that his prayer is in essence one for individual relief. His § 1983 action is therefore barred by this court's holding in *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980).

The summary denial by the California Supreme Court of De Vault's petition for review was a decision on the merits. *See, e.g., Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). De Vault should therefore have sought review in the United States Supreme Court by filing a petition for writ of certiorari.

Having decided that De Vault's action is barred by *Brown*, we do not reach the immunity issues presented by De Vault.

AFFIRMED.

APPENDIX C.

Order of the Supreme Court.

Order Denying Writ of Review, L.A. No. 31214.

In the Supreme Court of the State of California, in Bank.

Filed: May 11, 1980.

Alfred Thomas De Vault v. The State Bar of California.

Petition for writ of review DENIED.

/s/ Bird
Chief Justice

Opposition

Office - Supreme Court, U.S.
FILED
MAY 12 1982
ALEXANDER L. STEVAS

NO. 81-1879

IN THE

Supreme Court of the United States

October Term, 1981

ALFRED THOMAS De VAULT,

Petitioner,

vs.

ARMANDO M. MENOCAL, III, individually and as chair and member of the Committee of Bar Examiners of the State Bar of California; ROBERT H. O'BRIEN, individually and as former chair of the Committee of Bar Examiners of the State Bar of California; FRANCISCO CANCINO, MARTIN R. GLICK, MARY ANNE HARRISON, ROBERT A. HINE, CARLOS ORNELAS, PATRICIA PHILLIPS, BERTRAM S. SILVER, HERBERT J. SOLOMON, A. WALLACE TASHIMA, WILLIAM H. WAYSMAN, individually and as members of the Committee of Bar Examiners of the State Bar of California; ALFREDO CASTENEDA, individually and as former member of the Committee of Bar Examiners of the State Bar of California,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a federal district court have subject matter jurisdiction in a Civil Rights action to review a state court's final order denying an individual application for admission to the bar of the state, as distinguished from a general constitutional challenge to a state's general rules and procedures governing admission to practice law?

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No. 81-1879

In The

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October Term, 1981

ALFRED THOMAS DE VAULT,

Petitioner,

vs.

ARMANDO M. MENOCAL, III, individually and as chair and member of the Committee of Bar Examiners of the State Bar of California; ROBERT H. O'BRIEN, individually and as former chair of the Committee of Bar Examiners of the State Bar of California; FRANCISCO CANCINO, MARTIN R. GLICK, MARY ANNE HARRISON, ROBERT A. HINE, CARLOS ORNELAS, PATRICIA PHILLIPS, BERTRAM S. SILVER, HERBERT J. SOLOMON, A. WALLACE TASHIMA, WILLIAM H. WAYSMAN, individually and as members of the Committee of Bar Examiners of the State Bar of California; ALFREDO CASTENEDA, individually and as former member of the Committee of Bar Examiners of the State Bar of California,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's memorandum opinion in this case. That opinion, dated January 7, 1982, is unreported. A copy is attached to petition for writ of certiorari as Appendix B.

COUNTERSTATEMENT OF THE CASE

Petitioner is a 1977 graduate of a Committee of Bar Examiners ("Committee") accredited law school in California who first sat for the California general bar examination in July 1977. Petitioner failed both sections, i.e., the essay portion and the Multistate Bar Examination ("MBE") portion given at that administration of the examination.

Petitioner next sat for the bar examination in February 1978; and he passed the essay portion. Petitioner does not allege whether he also attempted but failed the MBE portion at that sitting.*

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* At that time and continuing through the present, Committee of Bar Examiners' policy allows applicants to elect to attempt to pass the general bar examination in sections. That is, instead of preparing for and taking both the essay and MBE sections at one administration, an applicant may choose to concentrate his or her efforts on passing one section at a time within a specified period. There is no limit on the number of times an applicant may take the examination.

On July 26, 1978, petitioner sat for the MBE section of the bar examination and handed in his answer sheets to an employee of the Committee at the conclusion of the examination. Thereafter, petitioner's MBE answer sheets were machine graded by Educational Testing Service, Inc. ("ETS") in Princeton, New Jersey; and petitioner received and there was reported to him in October 1978 a failing raw score of 132 correct answers. A raw score of 133 was passing.

Petitioner's MBE answer sheets remained in the custody of the Committee and ETS until the occasion of a visit by petitioner to the Committee's Los Angeles office in December 1978, when the answer sheets and a list of correct answers were given to petitioner for inspection in a room located in the Committee's office. The sheets were in petitioner's possession for about five minutes, during

which time petitioner was "monitored" by a Committee employee. Petitioner utilized the few minutes that the answer sheets were in his possession to count the number of correct answers. Petitioner "counted 134 correct answers" (a passing score); and the Committee employee present allegedly "verified this to be a fact."

Thereafter, petitioner's answer sheets were again processed through the ETS grading machine and a passing score of 134 correct answers was recorded. The difference is that in the first processing by the machine, incorrect answers to the last two questions (i.e., Nos. 199 and 200) were recorded, while on the second processing, correct answers to those questions were recorded. The factual controversy which was finally decided adversely to petitioner centers on whether petitioner altered his pencil-

marked answers to multiple choice questions Nos. 199 and 200 on the occasion of his visit to the Committee's office in December 1978.

Subsequently, petitioner's answer sheets were subjected to a number of tests (e.g., microscopic, photographic and chemical) to determine whether his answers to questions 199 and 200 had been altered after the examination date. According to petitioner's conclusionary allegations, these tests were "inconclusive."

In April 1979, the Committee appointed a special fact-finding sub-committee to investigate the circumstances surrounding the "discrepancy" in petitioner's answers and to report to the Committee. Three attorneys who otherwise had no connection with the Committee volunteered their services as members of the subcommittee.

The subcommittee held two hearings, in May and June 1979; and after receiving testimony and other evidence in July 1979, submitted its report and recommendations to the Committee. The majority (i.e., two of the three subcommittee members) concluded that petitioner had not altered his answer sheets and recommended that he be certified to the Supreme Court of California ("California Supreme Court") for admission to practice law. The third subcommittee member filed a dissenting report, concluding that petitioner had altered his answers and recommending that he not be certified.

By letter dated August 24, 1979, the Committee notified petitioner that it had "adopted the negative recommendation of the Subcommittee's dissenting member," but the letter went on to offer petitioner "the opportunity to request a

hearing before the full committee." Petitioner alleges that the letter did not contain "any notice of the intended purpose and scope of said hearing or the procedures to be followed thereat."

By letter dated September 7, 1979, petitioner requested such a hearing. The Committee granted petitioner's request and notified him that a hearing would be held on October 12, 1979.

At the October 12, 1979 hearing, petitioner was represented by counsel. Also present was an attorney "examiner" from the State Bar's Division of Trial Counsel, who had been "assigned" by the Committee to the hearing. Additional testimony and demonstrative evidence "against petitioner" was received at the hearing. Petitioner's counsel declined an invitation to cross-examine the witnesses who testified; and allegedly he was "not invited or given a reasonable

opportunity" to present witnesses or "make any statement on [petitioner's] behalf," although it is not alleged that he wanted to offer additional evidence or argument. When petitioner's counsel asked to read a lengthy prepared statement, he was told that the Committee members were "too tired" to hear it that evening but that he would be permitted to submit it for consideration. The hearing was then continued to November 17, 1979.

Despite the fact that the hearings were continuing and that a final determination had not been made, on October 25, 1979, petitioner filed in the California Supreme Court a petition for writ of review of the Committee's alleged "decision," this apparently being the decision not to adopt the recommendation of the subcommittee majority. The court denied the petition

without elaboration after the Committee filed a response pointing out that the petition was premature and requesting that the petition be denied without prejudice to petitioner.

The next and last Committee hearing regarding petitioner's MBE grade was held on November 17, 1979, as noticed, at which time the Committee heard final argument. On February 16, 1980, the Committee adopted its final decision, finding and concluding in essence that plaintiff had altered his answers to questions Nos. 199 and 200 and therefore that, as petitioner had originally been notified, he had failed the July 1978 MBE portion of the general bar examination.

In so reaching its final determination as to the examination alteration issue on February 16, 1980, the Committee stated:

> "The Committee has not considered, nor made any determination as to the moral character of the [petitioner]. If and when the [petitioner] has successfully passed the general bar examination, a determination will be made as to whether or not he possesses good moral character and proceedings pursuant to Rule X would be appropriate at that time." (Emphasis added.)

In the interim preceding the Committee's final action and on January 18, 1980, petitioner filed another (i.e., second) petition for issuance of a writ of review by the California Supreme Court specifically praying that the California Supreme Court order petitioner certified and admitted. This petition was denied almost four months later, on May 14, 1980, after the Committee's final decision had been rendered on February 16, 1980, and after the Committee on or about March 10, 1980, lodged with the court the Committee's final report of February 16, 1980 and

the transcript of the Committee's hearing held November 17, 1979. A copy of the California Supreme Court's order is attached to the petition for writ of certiorari herein as Appendix C.

Instead of seeking review of the California Supreme Court's May 14, 1980 order by petition to this Court for a writ of certiorari, on or about July 9, 1980, petitioner filed in the federal district court for the Central District of California a "Complaint for Violation of Civil Rights," naming as defendants thirteen present and former members of the Committee. By the Section 1983 action petitioner asked the district court to review and declare "null and void" the final determination that petitioner had failed the MBE portion of the July 1978 California general bar examination; and petitioner sought injunctive relief in the form of the district court's order

"requiring the Committee . . . to certify petitioner to the Supreme Court of California for admission . . . ". Plaintiff also sought recovery of compensatory and punitive damages, together with costs and attorneys' fees.*

On October 10, 1980, the district court granted defendants' motion to dismiss and ordered petitioner's complaint dismissed on the ground of lack of

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* Although no facts (as distinguished from bald conclusions) are alleged to support a request for such relief, the petitioner also asked the court below to "[d]eclare that all California bar applicants charged with actions involving moral turpitude must be accorded all of the benefits and protections of Rule X of the Rules Regulating Admission to Practice Law in California, and that cases of such applicants who may be charged with defrauding or attempting to defraud the Committee of Bar Examiners of the State Bar of California may not be heard and decided by the members of said Committee."

Rule X deals with Committee-adopted procedures for hearings to determine whether applicants possess the "good moral character" requisite for certification for admission. However, since petitioner has not yet passed the general bar examination, there has been no hearing to determine whether plaintiff presently possesses the requisite good moral character to be certified for admission.

subject matter jurisdiction. This order was affirmed by the United States Court of Appeals for the Ninth Circuit in its memorandum decision of January 13, 1982. (See petition for a writ of certiorari, Appendixes A and B.)

REASONS WHY THE WRIT SHOULD BE DENIED

At bottom, petitioner's petition for writ of certiorari lacks merit because it rests upon two clearly erroneous assumptions:

First, petitioner incorrectly asserts that by refusing to issue its writ of review the Supreme Court of California simply exercised discretion not to read and consider the merits of plaintiff's petition for review of the determination by the Court's administrative arm (i.e., the Committee of Bar Examiners of the State Bar of California) that petitioner had failed the California administration of the Multistate Bar Examination.

Second, petitioner incorrectly asserts that there is a conflict among the federal courts of appeals as to the circumstances under which a federal district court may properly exercise

subject matter jurisdiction in a civil rights action to review constitutional claims of state bar admission applicants.

Petitioner's first assumption is erroneous because the Supreme Court of California considers the merits of every petition for review filed by unsuccessful bar applicants. It is only those petitions which after analysis are perceived by the court to not involve questions of substance requiring plenary consideration, with full briefing on the merits and oral argument, that the court resolves the merits of the petition on the basis of the preliminary papers by order denying the issuance of the court's writ.* See Konigsberg v. State Bar of California, 353 U.S. 252, 254-258, 77

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* This practice is, of course, not unlike this Court's summary disposition on the merits of both appeals and certiorari cases not perceived to present questions of substance. See Rules 16.7 and 23.1, Rules of the Supreme Court of the United States.

S.Ct. 722, 723-726 (1957).* Compare In re Summers, 325 U.S. 561, 567-568, 65 S.Ct. 1307 (1945); Dasher v. Supreme Court of Texas, 658 F.2d 1045, 1049-1051 (5th Cir. 1981).

Accordingly, the court below properly concluded that the order of the California Supreme Court was reviewable by this Court by way of petition for writ of certiorari; and that petitioner

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* As this Court noted in Konigsberg, 353 U.S. at 254, 77 S.Ct. at 724: "In considering actions of the Committee of Bar Examiners the California Supreme Court exercises original jurisdiction and is not restricted to the limited review made by an appellate court. For example, that court declared in In re Lacey, 11 Cal.2d 699, at page 701, 81 P.2d 935, at page 936: 'That this court has the inherent power and authority to admit an applicant to practice law in this state or to reinstate an applicant previously disbarred despite an unfavorable report upon such application by the Board of Bar Governors of the State Bar, we think is now well settled in this state. * * * The recommendation of the Board of Bar Governors is advisory only * * *. [T]he final determination in all these matters rests with this court, and its powers in that regard are plenary and its judgment conclusive.'" See also: California Business and Professions Code, Section 6066; California Rules of Court, Rule 952(c) [formerly Rule 59(b) as discussed in Konigsberg]; Rules Regulating Admission to Practice Law in California, Rule I, Sections 2 and 11 (see Cal. Bus. & Prof. Code (West) foll. § 6068).

should have sought review by filing such a petition rather than attempting to collaterally attack the order by initiating a Civil Rights action in a federal district court.

The second assumption is erroneous because the petitioner misreads and incorrectly discusses several federal appellate decisions, apparently in an attempt to demonstrate a conflict among the circuits when in fact none exists. One of the most recent and comprehensive discussions of the proper role of lower federal courts in considering complaints of unsuccessful bar applicants is found in Brown v. Board of Bar Examiners of State of Nevada, 623 F.2d 605 (9th Cir. 1980). There the court carefully reviewed and analyzed the relevant decisions in the circuits which have considered the question. It concluded that while federal courts may hear

general constitutional challenges to state admission rules and administrative procedures of general application they may not review decisions on individual applications for admission. Clearly petitioner's complaint herein (which he did not seek to amend) essentially presents individual claims for relief and not a general constitutional challenge, petitioner in effect seeking to have the federal district court substitute its judgment on petitioner's individual application for that of the California Supreme Court.*

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* As indicated above, petitioner's prayer requested that the proceedings which resulted in the determination that plaintiff had not passed the MBE be declared "null and void," that the district court order that petitioner be certified for admission to practice law in California, and that petitioner recover compensatory and punitive damages together with costs and attorney fees. Only tangentially did he also request an order that "all California bar applicants charged with actions involving moral turpitude must be accorded all the benefits and protections of Rule X of the Rules Regulating Admission to Practice Law in California . . . " Of course the hearings involving petitioner to date have

Accordingly, the court below properly concluded that the order of the Supreme Court of California was reviewable by this Court by way of a petition for writ of certiorari; and that petitioner should have sought review by filing such a petition rather than attempting to collaterally attack the order by initiating a civil rights action in the federal district court, as to which the district court lacked subject matter jurisdiction.

The federal courts of appeals have developed a consistent rule for federal review of state bar admission cases. As the court in Brown v. Board of Bar

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not involved the question whether he possesses the requisite good moral character for certification. Moreover, the prayer for the order relative to all bar applicants was not based on any factual allegation (as distinguished from bald conclusions) that applicants who (unlike petitioner) have passed the bar examination but whose certification has been postponed pending moral character investigations are generally (or even frequently) denied fair hearings.

Examiners of State of Nevada, supra, stated at 623 F.2d 609:

> "A dichotomy has developed between two kinds of constitutional attack which might be pursued by an unsuccessful bar applicant. 'The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission.' Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), cert. den. 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227 (1977)."

Petitioner thus incorrectly contends that federal courts have asserted jurisdiction over admission cases "in a number of conflicting ways." (Petition, p. 6.) As long as the dichotomy described in Brown is kept in mind, all the cases cited by petitioner may be harmonized.

Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474 (7th Cir. 1974) (per curiam), is cited as an example of federal lower court review "of a complaint for essentially individual

relief." (Petition, p. 7.) The plaintiff in Whitfield, after failing the Illinois bar examination five times, sued the Illinois bar examiners in federal court under the Civil Rights statutes, alleging that:

> "(1) the [essay type] bar exam is unconstitutional because it has no rational connection with an applicant's capacity to practice law; (2) he passed the examination and should be so certified, and (3) procedural due process requires that he be permitted to see his exam papers and to compare them with model answers or answers of successful applicants." Id. at 476.

The district court apparently dismissed for failure to state a claim for relief without discussing the jurisdictional issue.* The court of

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* It is important to note that nothing in Whitfield indicates that the plaintiff had taken his constitutional attack on the essay bar examination to the Illinois Supreme Court; and this could be an explanation for the lack of discussion of subject matter jurisdiction. However, the court of appeals in Whitfield did cite Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752 and ("cf") Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274,

Whitfield is therefore entirely consistent with Brown.

A second case cited as conflicting is Martin-Trigona v. Underwood, 529 F.2d 33 (7th Cir. 1975). In that case the plaintiff passed the Illinois bar examination but was denied admission by the Illinois Supreme Court on moral character grounds. He then sued in federal court claiming: (1) a denial of equal protection since attorneys being disciplined allegedly were given more procedural rights than those seeking admission; (2) that requiring a bar applicant to prove good moral character violated due process; and (3) that the state examining committee should not have been given access to his Selective Service records which indicated plaintiff had been found unfit for military service because of emotional problems. Id. at 35.

The district court dismissed for lack of jurisdiction. The appellate court, however, seemingly affirmed on the merits. Since all the counts are challenges to general admission procedures, however, this case is well within the first category of cases described in Brown.

It is also claimed that the court in Martin-Trigona heard the case "even though the federal issues had been previously adjudicated by the state supreme court and a petition for a writ of certiorari had been filed in this court." (Petition, p. 7.) However, the Illinois Supreme Court based its decision primarily on state grounds, though it did consider a procedural due process claim. Use of Selective Service records was challenged as hearsay and beyond the scope of federal authority. In re Martin-Trigona, 55 Ill.2d 301, 302

N.E.2d 68 (1973), cert. den. 417 U.S. 909, 94 S.Ct. 2605 (1974). Thus only those issues would have been reviewed in the petition for certiorari pending at the time of decision. Apparently, the only issue litigated in both courts was the use of Selective Service records, challenged in the federal court on right of privacy rather than hearsay grounds. In any event, the court of appeals in Martin-Trigona found it "unnecessary to reach the questions raised by the defenses of res judicata and judicial immunity." See 529 F.2d at 35.

It is submitted that since in the federal litigation Martin-Trigona presented general federal constitutional challenges apparently not presented in the prior state adjudication, this 1975 Seventh Circuit decision can be harmonized with Brown and the more recent

decisions in other circuits, although admittedly it is difficult to understand why the court of appeals in Martin-Trigona elected to discuss the merits of the constitutional challenges while at the same time affirming the district court's order dismissing the complaint on the ground, inter alia, that it lacked jurisdiction to relitigate and review the judgment of a state supreme court in an admission matter. In all events, in 1977 the Seventh Circuit in an admission case clearly accepted as "generally true" the rule announced in other circuits that lower federal courts cannot review challenges to denial of individual applications for admission, noting however the distinction recognized in Brown that challenges to "general conditions" could be heard. Ktsanes v. Underwood, 552 F.2d 740, 743 (7th Cir. 1977), petition for rehearing denied

560 F.2d 790, 792, cert. den. 435 U.S. 933, 98 S.Ct. 1508.

Richardson v. McFadden, 563 F.2d 1130 (4th Cir. 1977) (rehearing en banc), cert. den. 435 U.S. 968, 98 S.Ct. 1606 (1977) is cited as an example of "confusion over the problem of jurisdiction," in which the court "strongly divided over the jurisdictional issue and ruled against plaintiffs on the merits." (Petition, p. 7.) Although a superficial reading of the case might give this impression, on close analysis it is seen that on en banc rehearing, while members of the court were divided on the jurisdictional issue, that issue was not decided; and indeed the majority recognized that it was not a federal court's function "to determine if the bar examiners made a mistake in one or more individual cases . . . ". (Emphasis added.) See 563 F.2d at 1131.

In Richardson, four black law school graduates brought an action in the federal district court for the district of South Carolina challenging the constitutionality of the South Carolina bar examination as applied generally to black applicants. Also, two of the four sought individual relief by way of the district court's injunction ordering the Sourth Carolina bar examiners to certify them as having passed the bar examination. The lower court abstained, and dismissed the action; and a panel of the Fourth Circuit affirmed except as to the two individual's claims, concluding that these plaintiffs should be ordered certified as having passed the examination. See Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976).

In Richardson there never was an appeal to South Carolina Supreme Court, and indeed it appears that at the time

no statute of South Carolina or rule of its supreme court provided for review by the court of determinations of the bar examiners. See 563 F.2d 1130, 1132, and esp. notes 2 and 3. This circumstance alone serves to distinguish Richardson from the instant case and from the Brown holding. Indeed as the majority stated on en banc rehearing in Richardson, 563 F.2d 1130, 1131:

> "At the outset, we recognize that a jurisdictional question is raised by the assertion of individual claims for relief by Spain and Kelly, i.e., whether, in judging the intellectual fitness of applicants to practice law, the Law Examiners performed a judicial function on behalf of the South Carolina Supreme Court, so that under such precedents as Doe v. Pringle, 550 F.2d 596 (10 Cir. 1976), cert. denied, 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227 (1977), and MacKay v. Nesbett, 412 F.2d 846 (9 Cir. 1969), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969), we should conclude that the district court lacked subject matter jurisdiction to review the denial of admission to the bar. We are divided on how this issue should

> be decided, but we find it unnecessary to debate or resolve our differences because a clear majority of us agrees that, even if the district court had subject matter jurisdiction, the proof will not support the conclusion that Spain and Kelly are entitled to individual relief."

Indeed, the majority's language in this connection, when read together with its statement, quoted above, that it is not a federal court's function to determine whether bar examiners have made mistakes in individual cases, quite clearly indicates that the majority would have accepted the reasoning of Doe and Brown if the federal plaintiffs had first sought and been denied relief by the state supreme court.

The en banc majority decision in Richardson can be distinguished and harmonized in still another way because the court recognized that it could not regrade the plaintiff's individual examination answers, and that indeed the

basis of the so-called individual attacks was the assertion that "other applicants at other times appeared to have received more favorable treatment in grading than that which was afforded [the plaintiffs]," 563 F.2d at 1131 (emphasis in original). Analytically, this is a charge that the South Carolina bar examiners changed their grading procedure (i.e., by instituting stricter standards)--a general rather than individual challenge.

Finally, any doubt regarding the position of the Fourth Circuit relative to its adherence to the rule announced in Doe v. Pringle and Brown is laid to rest by that circuit's decision in Woodard v. Virginia Board of Bar Examiners, 589 F.2d 1345 (4th Cir.1979), where the court concluded that Civil Rights claims of an unsuccessful bar admission applicant were properly dismissed for lack of jurisdiction, the

court expressly adopting the Doe v. Pringle rationale. See 598 F.2d at 1346.

A case which should also be noted is Dasher v. Supreme Court of Texas, supra, the original opinion which is cited by petitioner (i.e. 650 F.2d 711 [5th Cir. 1981]), although it was withdrawn on rehearing. (Petition, p. 6.) See 658 F.2d 1045 (5th Cir. 1981). The plaintiff in Dasher was not allowed to sit for the Texas bar examination since she had not attended an ABA accredited law school. A petition to the Texas Supreme Court for waiver was denied without opinion. The federal district court ordered her admitted to the exam. The court of appeals initially reversed for lack of subject matter jurisdiction, an issue first raised on appeal. Citing Brown and Doe v. Pringle, the court held that since this was only an individual claim for admission, lower federal courts have no power to hear the case. Id. at 716.

On rehearing, 658 F.2d 1045 (1981), however, the court in Dasher reached a different conclusion as to the jurisdictional issue on the basis that plaintiff's petition to the Texas Supreme Court had not raised any federal constitutional claims but constituted only a request for waiver of the Texas general admission rule that only graduates of approved law schools are permitted to take the Texas bar examination. So, reasoned the court on rehearing, since 28 U.S.C. §1257(3) authorizes this Court to review only final judgments in state court cases in which a federal issue was raised and adjudicated, the order of the Texas Supreme Court could not have been reviewed by this Court on petition for writ of certiorari. However, in this connection it is important to note that the Fifth Circuit flatly rejected a contention similar to petitioner's contention herein

that the Texas Supreme Court did not consider plaintiff's petition on its merits and therefore the court's order denying the petition was not a "final" judgment or decree reviewable by way of petition for writ of certiorari. See 658 F.2d at 1050-1051. The court then ruled against plaintiff on the merits. In the instant case, of course, it should be emphasized that there is a final order of the California Supreme Court denying petitioner's prayer for admission, in which petitioner raised the same federal constitutional claims which he later sought to have reviewed and relitigated in the instant federal court action.

Finally, also cited as conflicting are Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1967), cert. den. 390 U.S. 1011, 88 S.Ct. 1262 (1968), and Feldman v. State Board of Law Examiners,

438 F.2d 699 (8th Cir. 1971). (Petition, p. 6.) They are said to hold that "until a state court has somehow finally acted to deny admission there is no deprivation of a constitutional right within the meaning of 42 U.S.C. §1983." (Petition, p. 6.) Although this is a generally correct statement of a portion of the holdings in Chaney and Feldman, clearly there is no conflict with the Doe and Brown rationale or the decision of the court below in the instant action.

In Chaney, the plaintiff twice failed the California bar examination, then sued in federal district court under 42 U.S.C. §1983, generally attacking the use of essay-type exams. The district court dismissed and the court of appeals affirmed, holding in part that an essay examination is a rational method to test an applicant's fitness or capacity to practice law. Id. at 964-965.

As an alternative holding the court found that since Chaney had failed to seek review by the California Supreme Court of the Committee's determinations that he had failed the examinations, he had not been deprived of anything. As the court of appeals noted, under California law the Committee may only recommend; the California Supreme Court has inherent power to admit an applicant despite adverse recommendation. Id. at 966. Thus the plaintiff had failed to state a basis for seeking any federal relief, the Ninth Circuit finding it unnecessary (in 1967) to reach the question whether state court denial of admission could only be reviewed by way of petition for writ of certiorari in this Court. 386 F.2d at 967.

In Feldman, the plaintiff twice failed the Arkansas bar examination, then sued in federal court under 42

U.S.C. §1983 claiming that (1) the exam is unconstitutional due to a lack of any procedure for regrading; (2) the board of examiners acted negligently in exam grading; (3) he was discriminated against as a mental patient and a Jew; and (4) the board discriminated against him in grading. The trial court dismissed his complaint without prejudice as premature since he had failed to appeal to the Arkansas Supreme Court.

In Feldman, the Eighth Circuit affirmed the lower courts order of dismissal, deeming it to be with prejudice. The court noted that under Arkansas law the bar examiners can only recommend; the Arkansas Supreme Court makes the final determination. Citing Chaney, the court of appeals found that plaintiff had failed to state a federal constitutional claim. Moreover, the Eighth Circuit commented that the lower

court could also have "safely" dismissed the action on the grounds that it lacked jurisdiction or there was a failure to state a claim for relief, or both. See 438 F.2d at 701, 704.

CONCLUSION

Contrary to petitioner's assertions, the circuits which have directly addressed the question have uniformly concluded that federal district courts lack subject matter jurisdiction to review state court orders denying individual applications for admission to the bar.

Also contrary to plaintiff's assertion, plaintiff does not stand damned for life by the Committee's findings that he altered his 1978 MBE answer sheet. Petitioner may continue to take the bar examination until he passes. And only then will the issue be presented whether at that time petitioner possesses the requisite good moral character to be certified for admission. Only then will a determination be made whether it is necessary to conduct formal moral character hearings

pursuant to Rule X of the Rules Regulating Admission to Practice Law in California.

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 10, 1982

Respectfully submitted,

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